embraced within the one originally charged, but of a higher degree than that of which they were found guilty. It was contended by the accused that this action was in violation of the Act of Congress which prohibited the government from placing a person twice in jeopardy. So far as concerns the power of the Supreme Court of the Islands to itself convict the accused on appeal, such is the ordinary and valid procedure of the courts of that country. The case turned on the question of twice in jeopardy.

The United States Supreme Court held that the case was exactly parallel to one arising in one of the federal courts of this country, where, upon an indictment for a greater offense, and after the accused had been found guilty only of a lesser offense embraced within it, it was sought, after a new trial had been granted at the instance of the accused, to re-try him for the crime originally charged. The court conceded a difference in authority upon this question. Some cases held, it was admitted, that a new trial carried with it the right to be tried for no greater crime than that for which there had been a prior *conviction*. But the majority of the court were not impressed with the correctness of this view. The ground upon which new trials are awarded is that, by asking for a correction of errors made in the first trial, the accused waives the constitutional protection accorded him, and himself asks for a new trial notwithstanding that it places him twice in jeopardy. Those courts which limit the new trial to the crime as to which there was a prior conviction, hold that the accused limits this waiver to his needs, and that his request for a reversal applies only to so much of the judgment as convicted him of guilt; but he is not supposed to ask reversal of so much of it as acquitted him of offense.

In opposition to this view the court held that "it seems much more rational and in better accord with the proper administration of the criminal law to hold that, by appealing, the accused waives the right to thereafter plead once in jeopardy, when he has obtained a reversal of the judgment, even as to that part of it which acquitted him of the higher while convicting him of the lower offense. When, at his own request, he has obtained a new trial, he must take the burden with the benefit, and go back for a new trial on the whole case."

MR. JUSTICE MCKENNA, with whom concurred MR. JUSTICE WHITE and the CHIEF JUSTICE, takes the contrary view, and cites in the margin cases from seventeen American jurisdictions supporting him, and which he contends represent the clear and overwhelming weight of authority.

It is clear from this case, that the rights of appealing defendants in criminal cases, while they are strictly construed, are the same in the Philippine Islands as in the domestic territory of the United States. E. R. S.

A LAUDATORY PUBLICATION AS A CAUSE OF ACTION.—Attention was called in this Review some months ago (3 MICH. LAW REV., 559) to a decision of the Supreme Court of Georgia maintaining the legal right of privacy. That case was important, because it was the first authoritative declaration in favor of the legal sanction of a "right" which is essentially a conception of modern times, and interesting as showing the great adaptability of the common law to changing conditions and to the new conceptions of right and wrong, which come with advancing civilization.

That the civil law, at least as administered in a state whose jurisprudence and juristic ideas are influenced by its common law environment, also is capable of meeting new situations, is illustrated by the case of *Martin* v. *Nicholson Publishing Company*, decided on Jan. 2, 1906, by the Supreme Court of Louisiana. The opinion is not yet officially reported but is printed in full in the *New Orleans Picayune* (owned and controlled by the defendant) for Jan. 5, 1906. The trial court found the facts to be as follows: "That plaintiff is a physician in good repute and practice; that amongst reputable practitioners it is considered contrary to the ethics of the profession to advertise in any form in the public press, none but 'quacks' doing so; that it is considered especially reprehensible to resort to publications purporting to be interviews with patients or their relatives in which glowing accounts are given of alleged marvelous cures and physicians lauded accordingly; that this practice has been particularly condemned by the local medical society, and defendant was made aware of, and urgently requested to heed, the society's action by a committee appointed for that purpose, plaintiff being a member thereof; that within a few days after such warning defendant maliciously and well knowing the injury it would thereby inflict on plaintiff, published and circulated in its newspaper an article describing a cure wholly imaginary and fabulous, and attributing same to plaintiff, all with intent to bring him into ridicule and contempt. That the effect of this publication has been to put plaintiff in the attitude of an advertising quack, whereby he has been injured in his business, lowered in the eyes of his friends, humiliated, irritated and annoyed, for all of which he asks damages. The article complained of recites in substance: That in the case of a certain patient, after trying unsuccessfully for many years the accepted course of treatment, plaintiff had, at the last, employed in addition thereto, the method of a certain world-renowned surgeon with the result that complete success was achieved. The story purported to have come from the patient's father, who was naturally overjoyed at the outcome, and correspondingly laudatory of plaintiff." The plaintiff's treatment of this alleged case was described as "masterful," and the article contained none but words of commendation. The case was argued on defendant's exception to the petition, and was dismissed by the judge *a quo*, on the ground that the falsity of the article in question was not a sufficient cause of action, and because it did not appear from the petition that defendant *intended* to produce the impression that plaintiff procured this publication for the purpose of advertising himself. The trial court held that while such a publication might cause irritation and annoyance, yet such wrongs were too small and speculative to be actionable and that on the face of the petition "there appears no cause of action." The Supreme Court directed its discussion of the case to two questions of law. (1) Is a publication actionable which is alleged to be false, malicious and made for the "purpose of bringing plaintiff into the anger, hatred, contempt and ridicule of his fellow-doctors, and of the public," and to have injured him in his profession, by bringing him into contempt and by "disinclining people to employ him as a physician." To this question the court answered "yes;" that the initial allegation of malice expanded itself into all of the averments of the petition, and that it was not necessary, therefore, to charge that the publication was made with the intention of producing the

impression that "plaintiff had been instrumental in having his asserted cure advertised." (2) Is a publication actionable though entirely couched in commendatory words, when declared upon with the foregoing allegations as to malice and injury? And this question, too, the Supreme Court answered in the affirmative, basing its decision on the broad ground that words of praise, when spoken maliciously, may cause injury. The court also adds that "there is a principle involved, the right of privacy."

Can this decision be sustained on common law principles? Though no precise parallel, it is believed, is to be found in Anglo-Saxon jurisprudence the writer of this note is of the opinion that it can be. The plaintiff's brief, which the writer has had the privilege of examining, relies largely upon article 2315 of the Louisiana Civil Code, which is identical with article 1382 of the Code Napoleon, and reads as follows: "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it." This statement of the remedy for tort is broader and more sweeping than can be maintained at the common law, in particulars too well known to require mention here. But the decision of the Supreme Court is not apparently based upon any element of that article which is not also found in the recognized principles of the common law, though undoubtedly the petition in the present case would not satisfy the requirements of the strictly common law declaration in libel. But considering the principle applied in this case as an abstract principle of the law of tort, and excluding consideration of the archaic requirements of the common law regarding inducement, innuendo, etc., in pleading, the case seems sound on principle and in accordance with the general trend of authority.

The nearest approach to the facts in the present case, which the writer has been able to find, is in *Sullings* v. *Shakespeare*, 46 Mich. 408; 41 Am. Rep. 166: 9 N. W. Rep. 451, in which case the defendant had published in his newspaper an article ostentatiously puffing the plaintiff and tending thereby to bring him into ridicule. The case was allowed to go to the jury on the ground that such publication might be actionable, and of course that the question of damage was one for the jury. The jury found for the defendant, largely upon the ground that plaintiff had himself assented to the publication. In the principal case the court seems to regard the offense charged as an invasion of the right of privacy, rather than as an equivalent of the common law libel. The decision is in accordance with one's instinctive notion of "fair play," and is an encouraging indication that our courts are alive to the necessity of impartially but firmly applying general principles to curb the constantly increasing intrusion of the press into private affairs, regardless of the annoyance, humiliation or "damage" thereby inflicted upon the helpless victim.

H. M. B.

THE CY-PRES DOCTRINE.—The court of chancery of New Jersey in the recent case of *Brown et al.* v. *Condit et al.* (Sept. 30, 1905), 61 Atl. Rep. 1055, refused to apply this doctrine under the following circumstances: The will of one Susan M. Corson, bearing date July 7, 1897, disposed of her residuary estate "to the Hospital Fund for Sick Seamen at Navy Yard, Brook-